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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

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SUMMARY OF REPLY ARGUMENT

Hardison does not answer TWA's Rule 52(a) argument, rather he asserts that TWA made no effort to accommodate. The district court findings, which are amply supported by the record, destroy Hardison's assertion. TWA accommodated Hardison's special religious holidays, it held several meetings to seek means of accommodation, it affirmatively sought union help in the accommodation

process, it agreed to waive the seniority provisions of the collective bargaining agreement and authorized the union to seek a job swap. TWA would not have been placed in the position of not being able to accommodate if Hardison had not voluntarily transferred for secular reasons from a shift where he had sufficient seniority to observe his Sabbath to a shift where he knew he would have to work on his Sabbath. Under the circumstances of this case, TWA had no duty to violate, without union consent, the bona fide and nondiscriminatory seniority rights of other employees. To render any further accommodation, TWA not only would have dispossessed other employees of their seniority rights but also would have incurred extra overtime expense (if overtime would be required because of the contractual duty to work reduced forces on weekends) or deprive other areas of work coverage. Hardison was the only person scheduled in his important job on Saturdays and the job had to be filled 24 hours a day every day of the year to respond to emergencies. Given the foregoing findings that are firmly supported in the record, the court of appeals de novo trial must be reversed.

The core constitutional issue is not Hardison's freedom of religion but rather whether the accommodation scheme violates the Establishment Clause because private employers are compelled by government direction to accommodate an employee's religious beliefs by incurring extra expense or by infringing upon the rights of other employees. Hardison is receiving preferential employment rights solely because of his religion. No other employee can receive a comparable secular benefit for nonreligious purposes. Other religious employees may or may not receive comparable preferences. Religion is fostered and some sects are preferred over others. Religious strife is apt to result from application of the accommodation scheme and none

of the virtues of voluntarism, neutrality or mutual abstention are protected. Nor does the accommodation requirement pass muster under the three part test of *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). First, the sectarian purpose of the law is evident on its face and in its legislative history. Second, contrary to Hardison's assertion, even if the law has a valid purpose, the primary effect is to substantially aid religion and religious activities. The scheme does not escape its constitutional infirmities by the granting of aid to individuals. The effect of advancing religious activities is more pervasively sectarian than the proscribed indirect aid in *Nyquist, supra*. The Establishment Clause forbids aid to religion regardless of whether the law supposedly extends benefits equally to all religions and all religious beliefs. Third, the government is extensively entangled in continuous investigation, supervision, conciliation and controversy in respect to the determination of reasonable accommodation and undue hardship. The involvement is pregnant with the potential for ever expanding surveillance entanglements. The accommodation scheme violates the Establishment Clause.

REPLY FACTUAL STATEMENT

Neither Hardison nor any of the amici (the "amici" referred to herein are those in opposition to Petitioner), present a fair or balanced statement of facts. They endeavor to create the impression, by innuendo, that TWA and the unions harbored ill feelings toward Hardison or his religion (and all other minority religions) and, therefore, through some unspecified sinister "joint action" successfully discriminated against Hardison. (See, for example, Seven-Day Br., p. 52 and World-Wide Br., p. 17).

They also ignored the district court's findings regarding TWA efforts to accommodate.[1]

The evidentiary hearing before Judge Oliver consumed three full days in which the testimony of seven live witnesses was presented. If there was one scintilla of evidence demonstrating any discriminatory conduct or intent by TWA or the unions, Judge Oliver would have so found. (See, for example, the colloquies between Judge Oliver and the trial counsel at R. 86-100, 109-116 and 118-128). To the contrary, after reviewing the parties' stipulations, documentary evidence and hearing the live testimony, Judge Oliver observed that he was, ". . . impressed with the men who were on the line handling the problem." (R. 474).[2]

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1. While the amici's viewpoint could be expected because of their efforts to gain and keep special benefits for their religions, Hardison's failure to present a full factual statement is surprising in view of his acceptance of TWA's essentially identical factual statement in the petition for certiorari (Resp. Br. in Opp. to Cert., p. 4).

At the outset, TWA respectfully submits that the amici briefs contain erroneous factual assertions, overstated arguments and are significantly void of any rational consideration of the relationship between employers, employees, unions and union members. They continually ignore the impact the union presence has upon TWA. The amici urge short-sighted positions in respect of the proper relationship not only of Church and State but also the proper position of religion in the secular relationships of individuals.

2. Judge Oliver documented his findings by appropriate references to the trial transcript (A. 183-209). Notwithstanding Judge Oliver's diligent trial efforts and his documented findings, it is somehow divined that TWA and the unions were opposed to Hardison's religion. Page 12 of COLPA's brief and page 17 of World-Wide's brief typify such mistaken assertions. Ignored is the stipulated fact that no one threatened, maligned or impugned Hardison or his religion (A. 41). Indeed, Hardison twice wrote Kussman thanking him for his understanding and cooperation (A. 29 and 31). Similarly, Kussman wrote Hardison on October 11, 1968 and stated ". . . I wish you every success and happiness in your relationship with the church" (A. 30). TWA accommodated Hardison's special religious days (A. 238-240).

(Footnote continued on following page)

Hardison and the amici ignore TWA's business requirement that Hardison's job had to be filled 24 hours a day, 365 days a year because of the need to respond to emergencies (A. 125, 142, 149-150). One amicus attempted to factually argue that TWA made no proof of what happened on occasions when Hardison was absent (Seven-Day Br., p. 64). That "non-fact" is a red herring that misses the point that no one knows when an emergency will occur. The ignored evidence was that TWA naturally filled the job in Hardison's absence and that extra costs were incurred and some other employee or job function suffered as a result (A. 162).

Hardison's counsel stipulated that the seniority provisions required his dismissal (A. 76). Moreover Hardison could not remember whether he indicated any willingness to work four days a week (A. 83).

Hardison and the amici ignore the fact that TWA must rely upon the union steward to fill all jobs. The steward maintains the seniority list and he refers to the list to enforce seniority when necessary (A. 106, 127, 138-140 and 158). Judge Oliver recognized this as the normal procedure (A. 208). Yet, neither Hardison, the court of appeals, nor any of the amici demonstrated any cognizance or appreciation of the sound reasons why both management and unions do not want the employer placed in the position of appearing to coerce "volunteers". Similarly, Hardison, the amici and court of appeals ignore TWA's contractual obligation to work a minimal work force on

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Footnote Continued—

Kussman also testified that he ". . . respected the man's religious convictions" (A. 135). Hardison's suggested findings of fact made no contention of any intentional discrimination (Tr. A. 82-112). There simply was no intent to discriminate (A. 159) and it is now entirely too late to manufacture, even by innuendo, such a baseless charge.

the weekends and the general preference of high seniority employees not to work on weekends (A. 104, 120, 134, 135 and 216).[3]

Hardison erroneously asserts that TWA made no attempt to accommodate or to look for volunteers (Resp. Br., p. 20). No such assertion was made in his proposed findings of fact (Tr. A. 82-112). He now refers to page 261 of the appendix to support his position (Resp. Br., p. 20). Yet, that reference is not to the evidence but to the court of appeals' opinion which, in sharp contrast to Judge Oliver's findings, was not accompanied by any supportive record reference. TWA did authorize the union to search for swaps. For example, in May, 1968, the report was that it was understood that Hardison's day off requirements were "too difficult to handle . . . no one would swap . . ." (A. 28). Hardison and the amici also ignored the fact that TWA initiated meetings to seek accommodation. TWA also arranged for the union's presence at the meetings (A. 69-72). TWA agreed to waive seniority restrictions but the union refused to do so (A. 204, 207-209).

A closely related factual error is the assertion by one amicus (without record reference) that the collective bargaining agreement permitted a "volunteer" to fill Hardison's job (Seven-Day Br., p. 62). That factual assertion is totally erroneous. Hardison knew and understood that, under the applicable collective bargaining agreement, all jobs, openings or overtime had to be subject to bidding (Resp. Br., p. 17). It was each individual employee's right to accept or reject jobs according to the seniority list (A.

3. Hardison was acquainted with the problems of employers and employees respecting holidays and weekend work schedules because a prior employer had terminated him after he complained about holiday work schedules (Tr. App. 37). Those complaints by Hardison were made prior to his joining the World Wide Church of God.

214). Thus, neither the union nor TWA could indiscriminately seek a "volunteer". The union steward filled jobs by reference to the seniority list and if there were no takers, then seniority would be forced in reverse order. If a volunteer was found by TWA without union consent, every other senior employee would have a grievance for overtime pay. Further, Hardison and the amici ignore the fact that there were no situations where seniority was not followed as a matter of practice, even on holidays (A. 138-140).

Hardison (Resp. Br., p. 5) and one amicus (Seven-Day Br., pp. 7 and 61) misstate the record in asserting the unsubstantiated conclusion that some unknown employee on the graveyard shift "was willing" to swap. Both briefs fail to point out that Hardison later testified regarding whether the other employee was actually willing to swap, ". . . *I don't know*" (Hardison Dep. 90, emphasis added).

Hardison's factual statement fails to refer to his testimony that the obligations for members of the World-Wide Church of God are the same as those for non-members studying to become members (Hardison Dep. p. 25). Thus, it remains unexplained how Hardison could consistently write Kussman on April 25, 1968 that he could no longer work from Friday sunset to Saturday evening because, ". . . I *sincerely believe* this is the Sabbath and no servile work may be done then" (A. 28, emphasis added) and thereafter volunteer for premium paying overtime work (A. 73-74, 79-84, 100-101). While no one disputes the fact that Hardison was a member of the World Wide Church of God, the depth and sincerity of beliefs is an issue relevant to accommodation.

Hardison attempts to distort Kussman's agreement to grant Hardison a day off on each of his special religious holidays (Resp. Br., p. 3). He ignores Judge Oliver's spe-

cific finding that Kussman had agreed to do so (A. 203). Hardison also testified that he had no doubt that Kussman would have granted an excused absence for such holidays (Hardison Dep., p. 37).

Hardison's statement of facts also fails to acknowledge that when he made his December, 1968 voluntary shift transfer he knew he was giving up relatively high seniority and that he could reasonably expect some Saturday work in his new position (Resp. Br., pp. 3-4 and A. 104, 105).[4]

Hardison omits any reference as to why TWA and the unions felt obliged to take the respective positions each did in the accommodation process (Resp. Br., p. 5). Thus, Hardison fails to point out that while he had only himself to consider, TWA had to consider its other employees, its job requirements, its work scheduling problems and its relationship with the union. The union likewise had to consider the contractual rights of other parties and the overall administration of the collective bargaining agreement.[5]

Hardison and the amici take the position that the union's actions are no longer at issue. Nevertheless, a fair and balanced statement of facts should acknowledge

4. While Hardison now says that he was willing to do "anything", he should have given more serious thought to the probable and likely consequences of his December, 1968 voluntary transfer. Far from being intentionally deprived of his "livelihood" (World-Wide Br., p. 4), Hardison knowingly jeopardized his sabbath observances solely to satisfy a secular desire. It should also be noted that Hardison found other employment and was not destitute (Tr. A. 37).

5. Hardison's reference to his request for excused absences again does not fully explain what occurred (Resp. Br., p. 5). Hardison, in fact was evasive in his contacts with the supervisors and, likewise, Hardison failed to mention that despite advice from his wife, father-in-law and union he refused to cooperate in the filing of a grievance or in pursuing an appeal from his termination (A. 42, 175-176, 178-182, 231-232).

TWA's efforts to resolve the matter with the union. TWA's liability cannot be decided in a factual vacuum. An employer, and in particular supervisory personnel like Mr. Kussman who must work with a union every day, simply cannot ignore a union's specific refusal to vary bona fide collective bargaining provisions. That is particularly apt when the evidence reveals the high importance placed upon seniority by TWA's employees and that a great many of TWA's overhaul base grievances already related to seniority (A. 163). Such facts coupled with the real fear of additional grievances and morale problems place TWA's refusal to breach the collective bargaining agreement, without union consent, in a proper perspective.[6] Similarly, the amici are wrong in saying that only the employer possesses the "information" to effectively make an accommodation (COLPA Br., p. 25 and Seven-Day Br., p. 49). Here, as noted above, it was the union that possessed and controlled the employee scheduling information such as seniority lists (A. 106, 127, 138-140 and 158).

Finally, neither Hardison nor any of the amici acknowledge that none of the hypothetical "alternatives" found by the court of appeals were suggested at the time of the events, claimed at trial or even proposed as suggested findings of fact by Hardison (Tr. A. 82-112). Hardison's own answers to interrogatories demonstrate that his claim was based solely upon whether the seniority provisions had to be breached in the circumstances of this case (Tr. A. 24-26 and 35).

6. There is no evidence of any prearranged joint conduct or agreement by the unions and TWA to "whipsaw" or "one-two punch" Hardison (COLPA Br., pp. 33 and 34). If anyone was caught between a "Scylla and Charybdis" it was TWA. The employee knowingly jeopardized his ability to practice his religion. The union that TWA must live with every day refused to waive the seniority provisions of a collective bargaining agreement (A. 188). TWA also faced the contractual limitation of reduced weekend work forces, the fear of not getting overtime help, increased costs and the lack of work coverage.

REPLY ARGUMENT

I. TWA's Rule 52(a) Argument Was Not Answered And In The Circumstances Of This Case It Must Be Concluded That TWA Made Reasonable Efforts To Accommodate Without Undue Hardship.

Hardison has not responded to TWA's Rule 52(a) argument, rather he argues that there was, ". . . no attempt on the part of the Company to reasonably accommodate. . ." (Resp. Br., 17). Judge Oliver's express factual findings destroy Hardison's argument. Moreover, the court of appeals' substitution of its view of the facts cannot be squared with Rule 52(a).[7]

Matters of "reasonable accommodation" and "undue hardship" are questions of fact for the district court's determination. *United States* v. *City of Albuquerque,* 9 E.P.D. ¶10,182 (D. N. Mex. 1975), *aff'd,* 545 F.2d 110 (10th Cir. 1976); *Williams* v. *Southern Union Gas Co.,* 529 F.2d 483 (10th Cir. 1976), *cert. denied,* November 15, 1976, No. 75-1511 and *Johnson* v. *United States Postal Service,* 497 F.2d 128 (5th Cir. 1974). A review of the record and rele-

7. The court of appeals refused to follow the rule that in determining whether there is a sufficient evidentiary basis for district court findings of fact, the court of appeals must take the facts and inferences therefrom which are the most favorable to the prevailing party below. *Aunt Mid, Inc.* v. *Fjell Oranje Lines, Inc.,* 458 F.2d 712 (7th Cir. 1972).

The district court, as contrasted to the court of appeals, extensively reviewed existing case law. Its conclusions on those cases were not attacked by Hardison or the court of appeals. One amicus, however, attempts to circumvent TWA's argument by asserting that the court of appeals was deciding questions of law (Seven-Day Br., p. 51). That assertion is wrong. The court of appeals did not disagree on the law but rather squarely stated that the issue before it was whether the district court's findings were clearly erroneous (A. 251). The court of appeals just disagreed with the district court and in its *de novo* review, it substituted its view on the facts.

vant factors heretofore deemed important in various court decisions demonstrates that the district court's findings are correct and amply supported.

The Presence of a Nondiscriminatory Collective Bargaining Agreement. The applicability of a bona fide nondiscriminatory collective bargaining agreement must be given due consideration. See *Dawson* v. *Mizell,* 325 F. Supp. 511 (E. D. Va. 1971); *Yott* v. *North American Rockwell Corp.,* 501 F.2d 398 (9th Cir. 1974); and *Cooper* v. *General Dynamics, Convair Aerospace Div.,* 533 F.2d 163 (5th Cir. 1976), *rev'g,* 378 F. Supp. 1258 (D. C. Tex. 1974).

The district court found that ". . . under the circumstances" of this case, there was no duty to breach the collective bargaining agreement (A. 192 and 208). The seniority provision was neutral, evenhandedly applied, and was negotiated on a nondiscriminatory basis (A. 192). Further, the union met its duty of fair representation (A. 228). Thus, because part of TWA's business includes its relationship with unions and the management of its employees (who regard seniority as an important right), there should be no duty to violate the union's express directive that seniority could not be waived (A. 244). The impact of the evenhanded rule is truly "incidental" regarding any religious discrimination (A. 227). The seniority rights protected by the union were legitimately earned and were entitled to protection. Section 703(h)'s plain language saves such bona fide rights. There is no intentional past discrimination to remedy. Nor is there any joint effort by the employer and union to affirmatively deny employment rights.[8]

8. Upon the remand ordered in *Yott, supra,* the district court (Judge M. Real) on January 10, 1977 declared the accommodation guideline and statute unconstitutional under the Establishment Clause. Judge Real went on to find that, in any

(Footnote continued on following page)

At the very least, the impact of a bona fide collective bargaining agreement is a question of fact for the trier of fact. *Yott, supra* and *Cooper, supra*. The court of appeals' finding, or more aptly nondecision, on the seniority issue is based upon a contorted and misconceived view of the record. There was no doubt in the minds of the parties that in order for TWA to provide further accommodation it had to violate, without union consent, the collective bargaining agreement (Tr. A. 35-37). Hardison's interrogatory answers conceded that his claim was based upon failure to breach the agreement (Tr. A. 24-26 and 35). Moreover, the so-called "alternatives" of the court of appeals were fabricated from hindsight. Hardison did not rely upon or list such hypothetical "alternatives" at the trial or in his proposed findings of fact (Tr. A. 82-112). In fact, Hardison still realizes that the only way TWA could have provided further accommodation was to incur the union's wrath by breaching seniority. Hardison's brief devotes some 12 pages in support of his claim that TWA or the unions had to violate valid seniority rights of others but only some 2 or 3 paragraphs in support of the "alternatives" (Resp. Br., pp. 20-21). In any event, each alternative would require a breach of the collective bargaining agreement or the imposition of costs and grievance problems for TWA (TWA's Br., pp. 53-57).

Footnote Continued—

event, it would have been an undue hardship to permit Yott to refrain from payment of union dues. Judge Real also points out that accommodation is not a one-way street but a process which requires much cooperation by the employee. *Yott* v. *North American Rockwell*, 14 F.E.P. 447 (C. D. Cal. 1977). See also the February 17, 1977 decision in *Anderson* v. *General Dynamics*, 14 F.E.P. 667 (S. D. Cal. 1977). Judge Denney also found that nonpayment of union dues was an undue hardship. There is no difference in principle between seniority rights and the requirement of union dues. Moreover, it would be anomalous for an employer who agreed to waive the pertinent collective bargaining provisions to be held liable when the union that refused to do so escapes liability.

Morale, Grievance and Union Relations Problems. The district court also properly considered the morale and grievance problems that would be created by any further accommodation (A. 207-209). Hardison, the amici and the court of appeals would ignore cases such as *City of Albuquerque, supra; Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, November 15, 1975, No. 75-1105 and *Williams, supra*[9] which express concern for the effect of accommodation upon other employees. Furthermore, unlike the situation in *Claybaugh* v. *Pacific Northwest Bell Telephone Company*, 355 F. Supp. 1 (D. C. Ore. 1973), TWA affirmatively sought union help in the accommodation process. Once that requested help was met with a union refusal to vary seniority, it would be onerous to require TWA to act contrary to such an express union directive, particularly in the absence of any past or present actual discriminatory conduct. Thus, this case does not present a vague fear of mild problems. In the eyes of the people who were on the line handling the problem and dealing with the union on a day-to-day basis, a serious question existed concerning the ability to schedule work fairly and efficiently (A. 135, 140). Any other approach ignores the reality that part of TWA's business requires the management of thousands of employees (A. 207-209). *Dawson* v. *Mizell*, 325 F. Supp. 511 (E. D. Va. 1971). In a complex industrial system one cannot afford to wait for chaotic conditions before taking preventative action.

Extra Expense and Work Coverage Problems. Unlike *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd* by an equally divided court ..... U.S. ....., 50 L.Ed.2d 233 (1976) *set* for *reh. pending*, this case squarely presents an employer who would have incurred overtime wage ex-

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9. In the field of religion and the Constitution, the Court has stressed the importance of avoiding *potential* strife.

pense or work coverage problems. The court of appeals, however, rejected any factual consideration thereof whereas the district court made express findings on this issue (A. 244, see also TWA's Brief, pages 53-59). Moreover, one cannot simply look at the extra cost of overtime for one employee because Section 701(j) extends to *all* religious practices of *all* employees. The increasing litigation over religious accommodation issues, and the large number of religions, establishes that it would be shortsighted to limit consideration of incurred expense to only one employee.

Realistic Availability of Substitute Employees. Hardison was the only employee scheduled in his essential job on Saturdays. While much has been made of the so-called 200 available employees that figure is illusory and came about in response to a question from the district which assumed no restrictions on seniority (A. 134-135). Hardison, the amici and the court of appeals are, however, all laboring under the misconception that TWA could simply assign workers from a nonexistent "pool" or request volunteers to swap with Hardison. Under the applicable collective bargaining agreement any and every job opening or opportunity for overtime had to be filled by the seniority list (Resp. Br., p. 17). Once a job opened for whatever reason, it was subject to bidding and it became the *right* of all other employees according to seniority to seek or avoid. In other words, Hardison's job was subject to the relative rights of *all* other employees. If a volunteer was found, more senior employees would have grievances. If a volunteer was not found, another employee's seniority rights would be sacrificed solely to give Hardison special treatment. This fact alone distinguishes this case from those where a true volunteer system existed. It is extremely difficult to actually schedule work in a complex industrial system. It cannot be done equitably unless there is an evenhanded, objective and neutral approach (A. 140 and 150-159). Moreover, for sound reasons, it is the union steward who keeps the seniority list and fills the jobs. That procedure avoids direct or subtle forms of employer coercion in respect to overtime requests. *City of Albuquerque, supra.*

The Possibility of Having to be on Call for Emergency Service. There was an undisputed need to have someone in Hardison's job in the event of an emergency. Hardison, the amici and the court of appeals ignore that fact. They also rather naively say that TWA should have tested or determined whether or not the job really had to be filled or whether some other employee or shop function actually suffered (Resp. Br., p. 21). That suggestion flies in the face of common sense, the contractual obligation requiring reduced work forces at overhaul bases on the weekends and the general preference of high seniority employees not to work on weekends.

Affirmative Efforts to Accommodate. The basic defect in Hardison's argument that TWA made no efforts to accommodate stems from a mistaken factual impression. Illustratively, Hardison concludes, apparently by underscoring a portion of an exchange between Judge Oliver and Mr. Stone, that TWA would do nothing to accommodate employees (Resp. Br., p. 18). Mr. Stone testified *inter alia*, that, ". . . Well, we would try wherever we could to make adjustments, . . ." (A. 154-155). If there is anything wrong with that policy, the defect is so subtle that it escapes one's imagination. Judge Oliver's persistent trial efforts would have detected any veiled or latent refusal to accommodate. Moreover, the quoted exchange has nothing to do with Hardison specifically.

TWA's affirmative accommodation efforts were obvious to the district court in the form of granting Hardison days off for his religious holidays; holding meetings with Hardi-

son to seek accommodation, including the one Kussman initiated; seeking union cooperation, agreeing to waive any seniority provisions and in directing the union steward to seek swaps (A. 207-208). Those district court findings are simply above reproach in the circumstances of this case. However, in its *de novo* review, the court of appeals cast TWA as a "Pontius Pilate" (A. 254).

The Employee's Cooperation. Hardison now somewhat righteously argues that he offered to work "any hours", take any "combination of days off" and work "any shift". He says he was "agreeable" (Resp. Br., pp. 18-19). That claim overstates the facts because only two months prior to March of 1969, Hardison voluntarily transferred from a shift assignment where he had sufficient seniority to avoid any work on his Sabbath to one where he knew he could reasonably expect Saturday work. That transfer alone supports dismissal of Hardison's case. Yet, the district court, in its more than generous view toward Hardison, held only that such action should ". . . be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate" (A. 208).[10] Moreover, the district court properly considered the fact that neither TWA nor the union could divorce themselves from the duties they had to other employees and union members (A. 223-229 and 244). But,

10. Despite the transfer, TWA did not thereafter refuse to make further efforts at accommodation. Kussman actually initiated the March 6, 1969 meeting out of his concern over the scheduling problems. Moreover, Hardison and the amici fail to acknowledge TWA's continuing agreement to accommodate Hardison's religious holidays. That accommodation indicates no animosity by TWA because of the voluntary transfer. The days off also represented an important accommodation insofar as Hardison's religion was concerned. Illustratively, a school system in California is now engaged in litigation because it believed it could not reasonably accommodate a teacher's observance of the World Wide Church of God's special religious holidays. *Rankins v. Commission on Professional Duties*, # 5-Civil-3010 California Court of Appeals, 5th Appellate Division.

in its *de novo* review, the court of appeals ignored such facts (A. 255). Compare with *City of Albuquerque, supra,* and the decision on the remand in *Yott, supra.*

An inconsistent point in Hardison's position is the treatment accorded TWA's argument that, under the court of appeals decision, employers could not hereafter prove an inability to accommodate without undue hardship. Hardison's rejoinder was, "That may well be the point that Congress was trying to make" (Resp. Br., p. 19). In other words, Hardison admits, as indeed he must, that TWA's feared result is a reality. Yet, in later seeking to salvage the constitutionality of the scheme, he asserts that "Congress has not written an absolute; an employer is not always required to accommodate whatever religious beliefs his employees have" (Resp. Br., p. 38). Hardison cannot have it both ways. At any rate, Hardison and the amici ignore the relevant facts and circumstances surrounding TWA's efforts to accommodate. Also ignored is TWA's business need to be fair with its other employees, to fill its continuous operation job requirements without extra expense, and to protect its relationship with the union. To ignore those real and important facts reads the word "reasonable" out of the statute. The district court properly believed the word "reasonable" had to be considered (A. 240) and that a "hypertechnical" application of the words "undue hardship" would impose a priority of the religious over the secular (A. 226).

In summary, the findings by the trial judge who observed the witnesses establish that TWA's affirmative efforts to accommodate Hardison were serious and substantial. The decision to terminate was made in the good faith belief that business necessity compelled the action taken. There was no intentional discrimination. In reversing the district court's findings on its *de novo* review,

the court of appeals exceeded its proper duty of appellate review. Its view of TWA as a "Pontius Pilate" is totally belied by a fair reading of the entire record. For this reason alone, the judgment below should be reversed. More importantly, if the accommodation scheme is to be applied in a reasonable and fair manner for all concerned parties, the approach of the district court provides a more stable and evenhanded method of analysis than the exceedingly strict and rigid result created by the court of appeal's *de novo* review.

II. The Establishment Clause Governs And Renders The "Reasonable Accommodation-Undue Hardship" Requirement Unconstitutional.

The core constitutional issue is not Hardison's freedom of religion. He has that right, and will have it no matter what decision is reached here. The pertinent issue is whether the federal government can, at an individual's behest, coerce private persons not only to accommodate the religious beliefs of others but to do so unless they can prove "undue hardship."[11]

The Establishment Clause forecloses government requirements that a private individual or a group support the religion of another with contributions regardless of how large, small or infrequent the occurrence. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (see also the Seven-Day Br., p. 27). There is no difference in principle in such forbidden action and the requirement of "reasonable accommodation-undue hardship". In the present case, a private employer and its other employees are legally coerced to yield to the religious beliefs or practices of an employee and to incur extra costs or accept infringement of their contractual and nondiscriminatory seniority rights.

11. There really is no discrimination here because wholly neutral and secular work rules are involved. Moreover, the free exercise rights of other parties are interwoven in the accommodation process. Just as Mr. Justice Rutledge observed in his dissent in *Everson* at p. 58, "Of course, discrimination in the legal sense does not exist."

There can be no question that Hardison is demanding preferential employment rights based solely upon his religious beliefs. By such preferential treatment, the accommodation scheme imposes the religious beliefs of one on others. It effectively aids various religions in their proselytizing functions. It places religious believers in a superior position over the nonbeliever. It creates a situation ripe with potential religious strife on the secular job site. It unavoidably prefers some sects over others. It entangles government with religion in an administrative setting that has the seeds for ever-increasing involvement. In summary, the statute and guideline are pervasive aids to religious activity.

Hardison and the amici conduct an extensive search for some rationalization to support the accommodation requirement. Various alternatives include the Commerce Clause, Necessary and Proper Clause, the Fourteenth Amendment and the Free Exercise Clause. However, none of those alternatives recognize that the First Amendment stands as a barrier to both obvious and subtle departures from the express mandate that Congress shall make *no* law respecting an establishment of religion. The Establishment Clause is an affirmation that no unneeded and undue erosion can take place.

That is not to say, however, there is no play in the Establishment Clause. Past cases of this court recognize that inescapable truth. However, the counter arguments advanced in this case are overstated and prove too much and if accepted would render the Establishment Clause a

nullity. Moreover, the counter arguments are not new but have been presented and rejected by the Court on previous occasions. In fact, many of the present amici have, in the past, strenuously argued against the theories they now champion[12] thereby bringing to mind the observation that religious groups, ". . . all are quick to invoke its protections [the Federal Constitution]; they are all irked when they feel its restraints". *Everson, supra* (dissent of Jackson, J.), p. 27.

In *Nyquist, supra,* at pages 782 n. 38, 783 n. 39 (1973), the Court rejected the notion that grants to parents of private school children were necessary to equalize their position vis-a-vis public schools because that argument would provide a basis for approving the complete subsidization of all religious schools—a result wholly at variance with the Establishment Clause. Moreover, the so-called "equalization theory" has the effect of aiding a church in its proselytizing function thereby causing strife among religions. As Mr. Justice Frankfurter cogently observed in his concurring opinion in *McGowan* v. *Maryland*, 366 U.S. 420, 463 (1961):

> "In view of the competition among religious creeds, whatever 'establishes' one sect disadvantages another and vice versa."

It is absurd for Hardison and the amici to equate a failure or inability to accommodate because of secular reasons with religious discrimination or unequal treatment under the Constitution. In fact, the real inequality created by the accommodation scheme results from Hardison's receiving preferred treatment solely because of his

12. See Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 Supreme Court Review 57, 60.

religion.[13] Hardison is receiving special privileges that are not available to nonreligious employees. Employees with other religious beliefs may or may not receive comparable privileges based upon their religious needs. Thus, aid of the character given Hardison imperils the liberties of the nonbeliever and other believers. *Abington School District* v. *Schempp,* 374 U.S. 203, 305 (1963) (Opinion of Goldberg, J.).

The accommodation requirement creates government coercion enhancing not only the practice of religious beliefs but also the choice of religious beliefs. Government is, therefore, facilitating a "church's efforts to gain and keep adherents". *Abington, supra,* at 228 (Opinion of

13. One amicus tries to demonstrate that Hardison is not being granted preferential treatment (COLPA Br., pp. 15-24). However, it concedes that preferences are given because it says the preferences are no different from aid to handicapped workers. Hardison is not handicapped and the Establishment Clause has no conceivable relationship to handicapped workers. The amicus concedes as much by arguing that *McGowan* v. *Maryland,* 366 U.S. 420 (1961) and *Sherbert* v. *Verner,* 374 U.S. 398 (1963) uphold the preference here. That those cases do not do so is implicitly conceded by the amicus' conclusion that the firmly established "tripartite" test should not be applicable to this case. At any rate, neither *McGowan* nor *Sherbert* supports the idea that an exception must be given to religious sects from general secular duties. As Chief Justice Warren observed in *McGowan* at p. 453:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the state's coercive power to aid religion."

In other words, the accommodation scheme is not entitled to an "exemption" because on its face and in its effect it uses the State's coercive powers to aid religion. That is undoubtedly why the amicus felt impelled to urge its new "test". Nonetheless, that proffered test is not at all suited for application to the Establishment Clause issues in this case. *Nyquist, supra.* See also Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680, 1692 (1969). While Professor Freund agrees that political debate may be wholesome in some contests, in the "field of God and Caesar" he prefers the binding quality of judicial decisions.

Douglas, J.). Hardison and the amici have failed to demonstrate any way in which the accommodation scheme permits the government to remain neutral (in any sense) in the battle to gain and keep adherents.

The accommodation scheme has none of the recognizable virtues of voluntarism. Employers and other employees are forced to bear the costs of the burdens of conscience that ought to be borne by the employee. Rather than not coercing persons either into or away from support for religious practices, the government has established a far reaching bureaucracy to police and implement the regulatory scheme. Federal courts are compelled to make factual resolutions as to what establishes reasonable accommodation or undue hardship. One of the incurable constitutional vices is that to some religious sects no reasonable accommodation short of actual accommodation could ever satisfy their beliefs. Expectations are bound to be dashed. Ill will among employers and employees is bound to be nourished. Disappointment and mistrust of government is likely to result. Sects and employees will not understand why their sincere beliefs are accommodated in one case and not in all cases or why one sect is accommodated and they are not. Employers will not comprehend why they must accommodate while another does not. Compare *Johnson, supra; Reid, supra* and *Williams supra* with the result of the court of appeals in this case. Political and religious strife at the job site is bound to flourish. Many of the cases already adjudicated under the scheme reveal constant employee complaints. There is no sign of abatement. See, for example, *Parker Seal Co., supra; Williams, supra; Reid, supra* and *City of Albuquerque, supra.*

The refusal of some religious sects to accept the good faith of employers is illustrated in this case. The district judge who saw the witnesses had no doubt that TWA and

the union acted in complete good faith. One of the amici, on the other hand, suggests that TWA did not really object to the constitutionality of the accommodation scheme but had become ". . . so large and insensitive to individual employee's needs that it simply does not want to be bothered . . ." (World Wide Br., p. 17). That truly shocking and irresponsible statement demonstrates the position in which employers and unions are placed in dealing with the accommodation requirement. A review of the entire record would convince any fair-minded person that TWA's employees on the line handling the problem were caring and sensitive toward Hardison. In the best tradition of tolerance, TWA employees initiated and sought accommodations. They respected Hardison's beliefs. They wished him good luck in his relationship with his church. They agreed to waive the collective bargaining provisions. They granted Hardison special days off for religious observance. They only balked when the rights of other employees were involved and when the union refused to waive the seniority rights of other employees. At that point, TWA's own job requirements and incurrence of expense or lack of work coverage prevented further accommodation.[14] The answer

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14. It is a sad commentary to believe, as the amici do, that intolerance would reign supreme if the accommodation scheme is held unconstitutional. To the contrary, the affirmative actions of Mr. Kussman were undertaken to help Hardison as a person and not just to comply with a government mandate that TWA had to honor Hardison's religion. The amicus' argument does raise the spectre of even further government entanglement with religion through government mandated affirmative action programs for religious quotas or the building of mosques in industrial plants to facilitate prayer services. It would not be an undue hardship for Chrysler or General Motors to build such chapels or places of prayer for Black Muslim assembly line workers. Yet, the free exercise rights of other religionists or atheists who are offended by job site devotionals would be infringed. See, for example, *Young* v. *Southwestern Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975). The accommodation scheme is essentially unworkable both politically and administratively and therefore is apt to lead to strife. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

to that amicus is that TWA firmly believes the statutory scheme is unconstitutional and presents the exact fear expressed by Judge Celebrezze's dissent in *Parker Seal, supra*. If Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby impowered to breach it to take away religious freedoms. The fear of government aiding religious practices, aiding in proselytizing activities and imposing religion upon a secular environment is made a stark reality that every citizen should be concerned with and take action to stop. TWA fully supports its employees who were on the line handling this issue.

Nor does the accommodation scheme further any concept of mutual abstention. To the contrary, rather than keeping religion out of the job or the job out of religion, consideration is required of each employee's religious beliefs and practices in all job assignments, duties or responsibilities. Religious practices become a pervasive consideration in what was heretofore a secular setting.

Hardison and the amici rely heavily on *Sherbert, supra; Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and *Zorach* v. *Clauson*, 343 U.S. 306 (1952) to support their affirmative freedom of religion and "exemption" arguments (Resp. Br., p. 27 and Am. Jewish Com., et al. Br., p. 12). Those cases do not support their arguments.

Hardison's application of *Sherbert* would, in essence, reject, rather than merely subordinate, cases such as *Everson, supra*, and *Abington, supra*. Moreover, if the free exercise clause did not require released time in *McCollom* v. *Board of Education*, 333 U.S. 203 (1948) or mandate an exemption for Sabbatarians in *Braunfield* v. *Braun*, 366 U.S. 599 (1961), it is impossible to perceive how it could here require an employer to accommodate an employee's religious beliefs in the absence of "undue hardship". Hardison's rigid application of *Sherbert* also ignores that the Establishment Clause protects vital civil rights such as preventing government imposition of religion, the enhancing of religious beliefs of others and avoiding religious strife.[15]

Unlike *Gillette* v. *United States*, 401 U.S. 437 (1971) and *Sherbert*, Hardison had no fear of a severe criminal penalty or of being destitute. In fact, the record reveals that Hardison promptly found other employment (Tr. A. 37-38). Moreover, the impact of accommodation would be directly and immediately felt by the employer and other employees.

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15. The government cannot protect free exercise by promoting religion when that promotion causes any injury to others. The freedom of belief is extensive but the freedom to practice one's religion has limitations. See generally, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). The freedom of religion, ". . . does not and cannot furnish the adherents of religious creeds an entire insulation from every civic obligation." *McGowan, supra*, at 461 (Opinion by Frankfurter, J.). The Free Exercise Clause does not require that government must render affirmative aid to religion. *Abington, supra*, at 292-299 (Opinion by Brennan, J.). Justice Douglas characterized the first amendment as containing the command, ". . . that no one need bow to the religious beliefs of another", *McGowan, supra*, 575 (dissenting opinion) and, ". . . It may not thrust any sect on any person." *Zorach, supra* at 314. Thus, in *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 620, 627 (1961) the court noted that the secularist purposes of the Sunday laws were to create an atmosphere of recreation rather than religion and that Sunday business or labor by Sabbatarians was not prohibited, ". . . *so long as it disturbs no other person*" (emphasis supplied). Here, Hardison can practice his religion as he wishes so long as he does not impose upon TWA, the union, or other employees in respect to non-discriminatory uniformly applied work rules. As stated by Justice Rutledge in his *Everson*, dissent at 63:

> "We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other."

The same concern was expressed by Justice Jackson in his *Everson* dissent at page 27. Religion cannot be a private affair when restraints are imposed and a public affair when it comes to adding burdens on other faiths or those of no faith at all.

Unlike *Yoder, supra,* the granting of preferential treatment to Hardison generates government coerced exceptions to otherwise neutral and evenhanded employment rules. Further, Hardison, in sharp contrast to *Yoder,* thrust himself into a secular activity rather than seeking to be part of an integrated and self-contained social unit.

In *Zorach, supra,* nobody had to substitute for the pupil who was released for prayer; whereas, another employee had to fill in for Hardison. TWA also had to pay overtime wages or deprive other areas of work coverage. Further, the saving feature of *Zorach,* in contrast to here and *McCollom, supra,* was the absence of state coercion. Similarly, while the state could encourage or cooperate with religious exercises, it could not, ". . . use secular institutions to force one or some religion on any person". Nor could government coerce anyone to, ". . . observe a religious holiday". *Id.* 314. Here, the government is forcing private persons to bow to the religions and religious holidays of others.[16]

One amicus observes that neither the district court, court of appeals, nor any other court has found the accommodation requirement unconstitutional (Am. Jewish Com., et al., Br., p. 10). However, the district court's constitutional analysis was limited to the factual findings it made rather than those substituted by the court of ap-

16. *Welsh* v. *United States,* 398 U.S. 333 (1970) and other cases such as *Marsh* v. *Alabama,* 326 U.S. 501 (1946) are often relied upon by either Hardison or the amici. However, those cases are inapposite. Indeed, the idea that TWA's overhaul base could be construed as a "company town" is a simplistic notion having no relationship to the reality of the presence of strong, cohesive unions and the utter lack of any of the trappings of a town such as housing units. TWA, like Hardison, exists in a complex secular society not in a protected, private community.

peals.[17] Moreover, the existence of grave constitutional issues has dogged the reasonable accommodation requirement from its exception.[18] The dissent of Judge Celebrezze in *Parker Seal, supra,* demonstrates the concern expressed over the accommodation requirement's constitutionality. Indeed, the court of appeals noted that TWA's constitutional argument was ". . . not without articulate support" (A. 264). That articulate support is expanding as demonstrated by the January 10, 1977 decision by Judge Real, who, upon the remand in *Yott, supra,* declared the accommodation scheme unconstitutional. See *Yott* v. *North American Rockwell,* 14 FEP 445 (C. D. Cal. 1977). At any rate, consideration of *Nyquist's* three-part test confirms the constitutional invalidity of the accommodation requirement.

1. *The Accommodation Requirement Reflects a Sectarian Purpose.*

Hardison and the amici place great reliance upon this Court's not having found any congressional act violative of the Establishment Clause because of a lack of a secular purpose (Resp. Br., p. 29). But see *Abington, supra,* and *Epperson* v. *Arkansas,* 393 U.S. 97 (1968). The answer is obvious; no other legislative scheme has presented such a facially obvious sectarian purpose.

On the remand in *Yott, supra,* Judge Real stated that to ascribe a secular purpose to the amendment would be

17. The district court did not believe the employer could be required to finance the religious beliefs of employees (A. 244). The amicus' own counsel has seriously questioned the scheme's constitutionality. L. Pfeffer, *God, Caesar & The Constitution,* p. 335 (1975).

18. See, for example, Edwards & Kaplan, *Religious Discrimination and the Rule of Arbitration Under Title VII,* 69 Mich. L. Rev. 599, (1971) and the other legal commentaries collected in TWA's initial brief, p. 24 n. 10.

"pure sophistry". *Id.* 448. That common sense and direct observation is most refreshing. Senator Randolph also was not bashful in admitting that the purpose was to aid certain sects (see TWA's Br., pp. 37-40). Senator Randolph's remarks must be attributed as the purpose of the amendment. He was the author and sponsor. No senator rose to dispute him. Likewise, the amici are not bashful in admitting that Saturday Sabbatarians are directly benefited and in arguing that the amendment is, and was, needed and intended to equalize minority religions.[19]

This case does not present a vivid legislative preamble indicating a "reasoned" legislative response to a supposed massive existence of religious discrimination in private employment (*cf.* COLPA, Br., pp. 10-11). To the contrary, there is scant evidence, if any, that Congress found any such discrimination. See generally Edwards and Kaplan, *supra*, at pp. 600-602 n. 10. Given the void of any cogent rationalization of the accommodation scheme as anything other than a measure to aid religion and certain sects in particular, the law is unconstitutional because of its purpose. When the language of the law and its legislative history are considered together, the purpose to aid religion is evident.

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19. The heavy reliance on *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971) by Hardison and the amici is really superfluous to any consideration of the amendment's purpose. *Griggs* has no relationship to the First Amendment.

Hardison and the amici assert that petitioners have not challenged Title VII's basic prohibition against religious discrimination. That issue is not before the Court and need not be challenged at this time. However, if that basic prohibition means the same thing as "reasonable accommodation-undue hardship", then it is unconstitutional just as the amendment and guideline here at issue. TWA makes no concession that the basic prohibition insofar as it relates to religious discrimination may or may not be constitutional.

2. *The Primary Effect of the Accommodation Requirement Is Sectarian.*

Hardison's argument against the "primary effect" of the amendment and guideline is that it does not *advance* but rather *protects* ". . . the religious freedom of those who observe a day other than Sunday, as their holy day of rest" (Resp. Br., p. 32). Yet, in nearly the next breath, Hardison argues that, ". . . there is no effect on religion in the present case." (Resp. Br., p. 32). On whichever ground Hardison ultimately bases his argument, the cases do not support the notion that a law found to have an effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. See *Nyquist, supra,* 783 n. 39. *McGowan, supra, Abington, supra,* and *Tilton* v. *Richardson,* 403 U.S. 672, 683 (1971). In the latter case, the Court found that the mere possibility that a federally funded structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might, ". . . *in part* have the effect of advancing religion" (emphasis added).[20] More importantly, the various programs at issue in *Nyquist* undoubtedly protected the right to send children to a religious school but they also failed to satisfy the constitution because they advanced religion.

The primary effect of the religious accommodation scheme is a direct aid given to religious activity. The government's enhancement of religious practices is more pervasively sectarian than the aid in *Nyquist.* Regardless of any other assumed benefit other than a nonreligious benefit, there remains a substantial advancement of religious activ-

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20. The government is not made the less neutral by not giving what it cannot give in the first place. *Everson, supra* at 40-41 (dissenting opinion by Rutledge, J.).

ity. Essentially religious activities of religious individuals and institutions are being supported by the government in an otherwise secular work situation. Thus, the advancement of religion is markedly more pronounced and direct than in *Tilton, supra* or *Nyquist, supra.* The religious character of the aid here cannot be characterized as secular when compared to the purely secular school books in *Board of Education* v. *Allen,* 392 U.S. 236 (1968) or the transportation available to all citizens in *Everson, supra.* There simply is no comparable secular benefit available to all workers.

Hardison, however, argues that the primary benefit supposedly accrues to individuals and therefore passes constitutional muster (Resp. Br., p. 33). That argument misses the mark. The benefit directly enhances the individual's actual practice of his religion. Hardison's argument is really one of form and not substance because the Establishment Clause says Congress can pass *no* law. What may not be directly done certainly cannot be accomplished by indirect tactics. *Abington, supra.* Further, the arguable indirect benefit of tuition grants was not permitted in *Nyquist, supra* and the benefit here is much more religious in nature than education.

Hardison supports his discussion of "effect" by taking out of context a quote from Chief Justice Burger's dissent in *Nyquist, supra* (without identifying the quote as coming from a dissenting opinion). Just prior to the extracted quote, the Chief Justice, in describing his dissenting philosophy that aid to individuals generally stands on a different footing, stated at 801-802:

> "I say 'generally' because it is obviously possible to conjure hypothetical statutes that constitute either a subterfuge for direct aid to religious institutions or a discriminatory enactment favoring a religious over non-

> religious activities. Thus, a State could not enact a statute providing for a $10 gratuity to everyone who attended religious services weekly. Such a law would plainly be governmental sponsorship of religious activities; no statutory preamble expressing purely secular legislative motives would be persuasive."

The government here is sponsoring religious activities with a discriminatory impact upon the employer, other employees and other religions. Thus, the grant of aid to individuals does not salvage the accommodation scheme. Secular activity is discriminated against and the primary effect remains one of substantially advancing aid to and on behalf of religious activity. Here, rather than a $10 grant, to persons who attend religious services, the government coerces a day off to attend religious services. The principle is the same. Finally, the interface of the government with a religious activity is not obviated by the aid being given to the individual. The government's involvement with the accommodation scheme is pervasive and continuing because its role is not satisfied by a mere grant of a credit. Investigations, inspections, coercion and controversy over the accommodation scheme are inevitable and indeed are called for by the law.

Hardison digs himself a deeper hole by asserting that the primary effect is somehow diluted because all aspects of religious observance and all religions are equally covered (Resp. Br., p. 34). The argument falls of its own weight. Indeed, that reasoning runs headlong into Mr. Justice Frankfurter's teaching in *McCollom, supra,* at 227 that:

> "Separation is a requirement to abstain from fusing functions of government and of religious sects, *not merely to treat them all equally.*" (Emphasis added).

Hardison and the amici make the supposition that, if he worked for the government, *Sherbert* would have protected him (Resp. Br., p. 35) (COLPA, p. 30). Why that assumption follows is left unexplained. *Sherbert* does not compel a decision for Hardison. Further, government agencies have been sued in their capacity as an employer in nearly identical situations to the case at bar. See, for example, *Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974) and *Dawson* v. *Mizell*, 325 F. Supp. 511 (E. D. Va. 1971). In both cases, the government's action of dismissing the employee was upheld. Indeed, in *Dawson*, Judge Merhige rejected the claim that *Sherbert* was in any sense applicable and held that discrimination could not be equated with a failure to accommodate. There, as here, a collective bargaining agreement covered a large number of employees who regarded seniority rights with "utmost importance". At any rate, the actions of the government are not at issue in this case except insofar as the passage of the amendment and guideline are concerned.

Hardison's argument that sincerity is not at issue is not correct (Resp. Br., p. 37). Sincerity must be considered in the accommodation setting in this and all other cases. More importantly, any government that endeavors to extend so-called exemptions to the "faithful" will "truly be government beseiged by the faithful". *Morgan, supra*, at 97.

3. *The Statute and Guideline Require Excessive Entanglement of the Government in Religion.* Hardison asserts that no excessive government entanglement is present. While it is difficult to perceive the underlying rationale for that position, Hardison appears to argue that § 701(j) only ". . . fosters consideration for the schedules of working men with *sincere beliefs*. . ." (Resp. Br., p. 39, emphasis added—compare with his assertion that sincerity is not an

issue). The same apparent theme that accommodation merely serves as a gentle catalyst to bring employee and employer together thereby ". . . *forcing* on the employer a genuine examination of his own business needs" is made by the amici (COLPA Br., p. 14, emphasis added). The numerous cases already in existence and the rather strident positions urged by the amici demonstrate that the search for reasonable accommodation without undue hardship is a difficult and controversial issue that will entail government involvement.

The concessions that Hardison makes in respect to Congress not writing an "absolute" and that in some cases an employee's religious beliefs "must give way" (Resp. Br., p. 38) underscores the extensive entanglement required of government through investigation, conciliation efforts and enforcement of governmentally designed rules. The pervasive religiosity and direct government involvement in the accommodation process involving nearly all employers and employees across the country is unjustifiable. As stated in *Abington, supra*, 307 (Opinion by Goldberg, J.) in respect of the government's role in school prayers:

> ". . . and utilizing [its] prestige, power and influence of school administration, staff and authority *cannot realistically be termed simple accommodation* and [it] must fall within the interdiction of the First Amendment." (Emphasis added).

Hardison's reliance upon *Walz* is misplaced. The tax exemptions there at issue had a long-standing history creating no excessive entanglement either administratively or politically. The importance of *Walz* is best understood when one considers that symbolically, in this country, the power to tax has implied the power to destroy. Thus, the principle of neutrality was best served by the government's

nonexercise of that power. Here, the government involvement necessarily entails official and continuing surveillance. The indisputably religious character of the aid renders the scheme pregnant with involvement. Furthermore, the right to apply uniform work rules without discriminatory intent is firmly embedded in the fabric of our large industrial systems.

Ordinary debate may be helpful in political issues but, the Constitution sought to avoid devisive debate concerning religious issues. Freund, *supra*, and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As the Court stated in *Lemon* at p. 626:

> "The Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice, and that while some involvement and entanglement are inevitable, *lines must be drawn.*" (Emphasis added).

The line must be drawn against the accommodation scheme. Religion must remain a private matter. Otherwise, it will henceforth be exceedingly difficult for the Court to find a foothold to prevent erosion of the Establishment Clause.

CONCLUSION

The decision of the court of appeals must be reversed both on the facts and the applicable law. The accommodation scheme is unconstitutional under the Establishment Clause.

Respectfully submitted,

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